

IN THE UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF GEORGIA  
MACON DIVISION

ELECHIA GIBSON,

Civil Action File No.

Plaintiff,

v.

WAL-MART STORES EAST, LP.,  
WAL-MART STORES EAST, INC.,  
WAL-MART STORES, INC., AND  
KEVIN MCCUEN,

Defendants.

**NOTICE OF REMOVAL**

COMES NOW WAL-MART STORES EAST, LP., WAL-MART STORES EAST, INC., WAL-MART STORES, INC., AND KEVIN MCCUEN, named Defendants in the above-captioned matter, by and through thier counsel of record, within the time prescribed by law, and file this Notice of Removal, showing the Court as follows:

1.

The above-named Plaintiff filed suit against Defendants WAL-MART STORES EAST, LP., WAL-MART STORES EAST, INC., WAL-MART STORES, INC., AND KEVIN MCCUEN in the State Court of Bibb County, Georgia, which is within the Macon Division of this Court. 28 U.S.C.A. § 90 (a)(2). Said lawsuit is styled as above and is numbered as Civil Action File No. 71856. Plaintiff's claims against Defendants includes claims of negligence.

2.

Plaintiff filed the Complaint on or about May 29, 2009. Defendants WAL-MART STORES EAST, LP., WAL-MART STORES EAST, INC., and WAL-MART STORES, INC.,

received service of summons and a copy of the Complaint on June 15, 2009. Defendants file this notice of Removal within thirty (30) days after service of summons and a copy of this Complaint.

3.

Defendants WAL-MART STORES EAST, LP., and WAL-MART STORES, INC., are Delaware corporations with their principal places of business in the State of Arkansas. WAL-MART STORES EAST, INC., is an Arkansas corporation with its principal place of business in the State of Arkansas. Defendant WAL-MART STORES EAST, LP., WAL-MART STORES EAST, INC., WAL-MART STORES, INC., were not citizens of the State of Georgia or Mississippi at the time of or immediately prior to the filing and service of said lawsuit, or at any time thereafter.

4.

Elechia Gibson is believed to be a citizen of Mississippi. Complete diversity of citizenship exists between Plaintiff and Defendants. Plaintiff's complaint also names as a Defendant Kevin McCuen who is alleged to be a resident of Georgia (Complaint, ¶19), and is further alleged to have been employed by Wal-Mart Stores, Inc. at its store located in Macon, Georgia. (Complaint, ¶20).

5.

In the event Plaintiff is a citizen of Georgia, the citizenship of Kevin McCuen should be disregarded for purposes of determining jurisdiction under 28 U.S.C. § 1441 because Plaintiffs have no possibility of recovery against him and, therefore, he has been fraudulently joined solely for the purpose of defeating federal diversity jurisdiction. See,

e.g., Illinois Cent R.R. v. Sheegog, 215 U.S. 308 (1909); Tapscott v. MS Dealer Services Corp., 77 F.3d 1353 (11<sup>th</sup> Cir. 1996).

6.

Although the complaint attempts to lump Kevin McCuen into the category of “Defendants,” the factual allegations of the complaint, do not contain wrongful conduct on the part of this individual as to which he could be found liable.

7.

There is no factual basis or colorable claim against Kevin McCuen in his individual capacity. Under Georgia law, a “corporation possess legal existence separate and apart from that of its officers, employees, shareholders and directors.” Kilsheimer v. State, 250 Ga. 549, 299 S.E.2d 733, 734 (Ga. 1983). Therefore, a lawsuit against a corporation cannot proceed against the officer or employees of the corporation in their personal capacity absent persuasive evidence for piercing the corporate veil. Id.; Mitcham v. Blalock, 214 Ga. App. 29, 447, S.E.2d 83, 88 (Ga. App. 1994). Plaintiffs have not established and cannot establish, any basis to pierce the corporate veil of Wal-Mart Stores East, LP. to reach an assistant manger who was not responsible for the negligent acts alleged in Plaintiffs’ complaint.

8.

Removal is appropriate because Plaintiff has “no real intention to get a joint judgment, and . . .there [is] no colorable ground for so claiming.” AIDS Counseling and Testing Centers v. Group W. Television, 903 F.2d 1000, 1003 (4<sup>th</sup> Cir. 1990). As demonstrated by the lack of allegations in the complaint directed solely toward Kevin McCuen it is evident that no viable claim for relief can be stated against the non-diverse

Defendant, and his joinder is a sham which should be disregarded.

9.

Plaintiff claims pain and suffering, past and future medical expenses, disability, disfigurement, mental anguish, loss of capacity for the enjoyment of life, impaired ability to labor, future medical expenses, permanent injuries, lost wages, and surgery. The amount in controversy, exclusive of interest and costs, exceeds \$75,000.

10.

This action is removable pursuant to 28 U.S.C. §§ 1332, 1441, based on complete diversity of citizenship between Plaintiff and Defendants.

11.

Pursuant to the provisions of 28 U.S.C. § 1446, Defendants have attached as Exhibit "A" copies of all the pleadings that were provided to and served upon Defendants, including copies of all pleadings that have been filed to date in the State Court of Bibb County, Georgia for the above-styled case.

12.

Pursuant to 28 U.S.C. § 1446, Defendants are not required to file a removal bond.

13.


Written notice of the filing of this Notice of Removal will be given to all parties as required by 28 U.S.C. § 1446.

14.

A true and correct copy of this Notice of Removal will be filed with the Clerk of the State Court of Bibb County, Georgia, as required by 28 U.S.C. § 1446.

WHEREFORE, Defendants WAL-MART STORES EAST, LP., WAL-MART STORES EAST, INC., WAL-MART STORES, INC., AND KEVIN MCCUEN pray that the above-captioned lawsuit be removed to the United States District Court for the Middle District of Georgia, Macon Division.

McLAIN & MERRITT, P.C.

  
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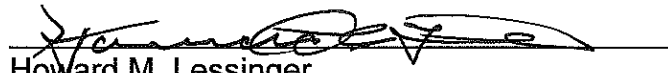
**CERTIFICATE OF SERVICE**

I hereby certify that I have this date served a copy of the within and foregoing **NOTICE OF REMOVAL** upon counsel for all parties by depositing same in the United States Mail in envelopes with sufficient postage affixed thereon to insure delivery addressed as follows:

James A. Rice  
James A. Rice, Jr., P.C.  
563 Spring Street  
Atlanta, GA 30303

This the 7 day of ~~June~~ <sup>July</sup>, 2009.

McLAIN & MERRITT, P.C.

  
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